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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 250.

PUBLICKER INDUSTRIES INC. *Petitioner,*

v.

EARL W. CLARK, Director of the Division of Liquidation, Department of Commerce.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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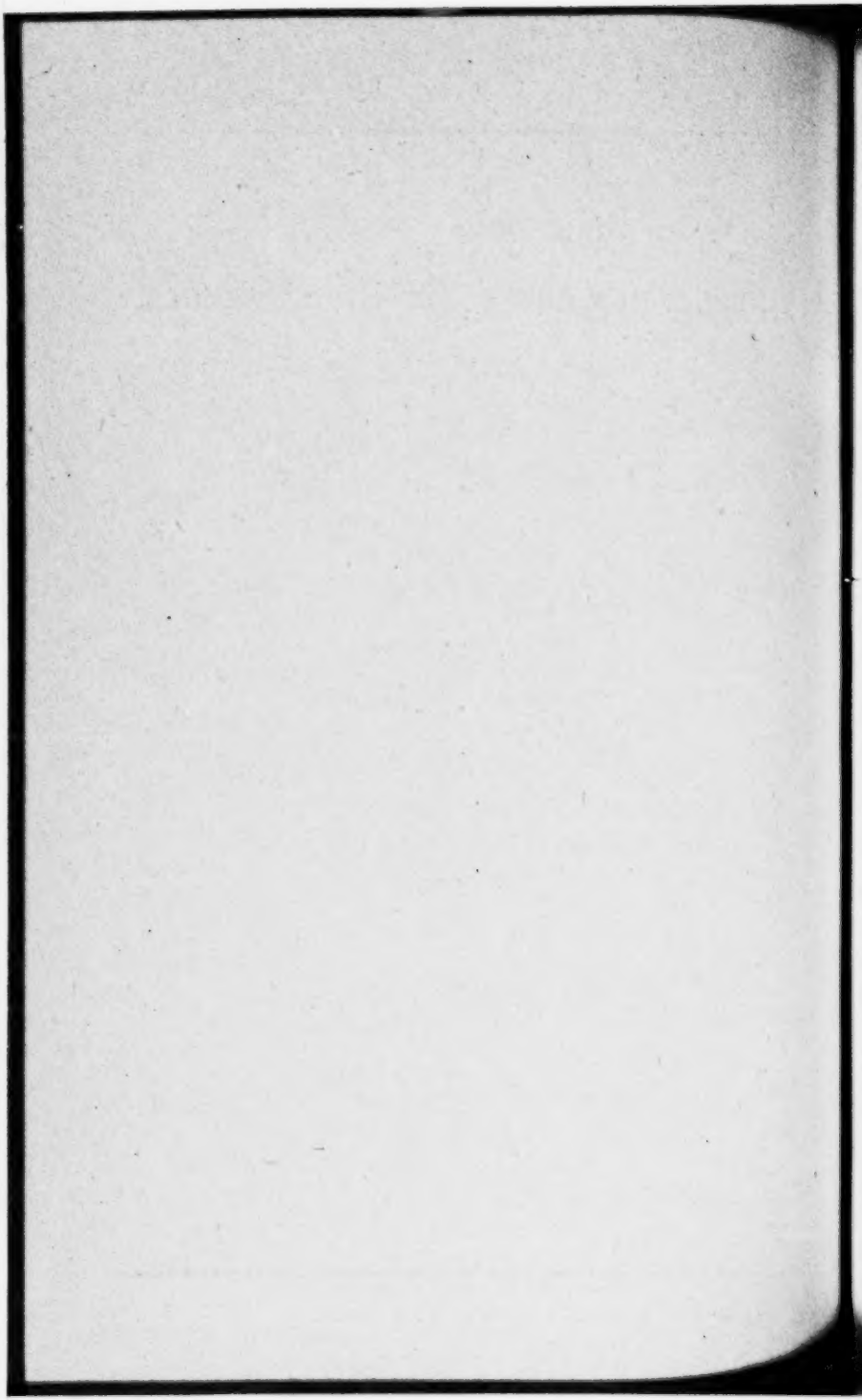
August 5, 1947.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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EARL W. CLARK, Director of the Division of Liquidation, Department of Commerce.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Publicker Industries Inc. prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled case on May 31, 1947. The order denying petition for reversal of judgment or rehearing was entered on July 10, 1947.

OPINION BELOW.

The original opinion (R. 569) of the United States Emergency Court of Appeals was rendered on May 31, 1947, and the amended opinion was rendered July 10, 1947 (R. 580).

The opinion, as amended, has not yet been officially reported.

JURISDICTION.

The judgment of the court below was entered on May 31, 1947 (R. 576). The order amending the court's original opinion and denying petitioner's application for reversal of judgment or for rehearing was entered July 10, 1947 (R. 580). The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, 50 App. U. S. C. 924 (d); 56 Stat. 31.

QUESTIONS PRESENTED.

Petitioner is a manufacturer of ethyl alcohol from molasses and from grain. During the period in question petitioner's entire output of grain alcohol, as well as that of its competitors, was purchased by the United States through the Defense Supplies Corporation. The alcohol was sold to the government under contracts which specifically provided that the seller's profits would be subject to renegotiation under the Renegotiation Act.

These contracts also stipulated that the price to be paid by the United States should be determined under price regulations promulgated by the Price Administrator under the Emergency Price Control Act of 1942. Pursuant to this provision of the contract, the Price Administrator issued MPR 28, fixing a separate price for each plant based on its actual costs plus a fixed profit per gallon.

Amendment 10 to MPR 28 is the act of the Administrator specifically attacked in this case. Amendment 10 had the effect of cutting petitioner's alcohol profits by 45 per cent, leaving the profits of petitioner's four principal competitors virtually untouched (R. 460). Amendment 10 was found valid by the court below on the ground that it was intended to, and did in fact, achieve the purpose of establishing a generally uniform rate of return on capital invested in each alcohol plant in the industry.

The questions presented are:

1. Whether the Price Administrator had authority to issue a price regulation, applicable to an entire industry, for the sole purpose of reducing the profits of individual members of the industry on their sales to the Government, when the Congress had vested that power in other administrative agencies under the special safeguards provided in the Renegotiation Act.

2. Whether the Administrator had authority to establish a pricing formula for an entire industry, intended solely to give each individual producer a uniform rate of return on capital invested, contrary to the expressed intent of Congress as to the correct measure of profits on sales to the Government.

3. Whether the pricing regulation here involved unlawfully discriminated against petitioner as compared to its competitors.

4. Whether the court below erred in requiring petitioner to prove a point admittedly impossible of proof—that the regulation allowed a smaller rate of return on plant investment to petitioner than to its competitors.

STATUTES INVOLVED.

The statutes involved are the Emergency Price Control Act of 1942, as amended, 50 App. U. S. C. 901; 56 Stat. 23 and the Renegotiation Act, as amended, 50 App. U. S. C. 1191; 58 Stat. 78. The pertinent provisions of these Statutes appear in the Appendices A and B, respectively, *infra*, pp. 17-20.

STATEMENT.

This case arises from a protest (R. 1) filed November 18, 1944 by Publicker Industries Inc., petitioner, against Amendment 10 to MPR 28 issued November 6, 1944 and effective November 11, 1944. Maximum Price Regulation No. 28, as amended by Amendment 10, established maximum

prices for alcohol produced from grain sold by producers to the Defense Supplies Corporation. During the period MPR 28 was in existence, all grain alcohol was required to be sold to the government under contracts which provided that the price to the government should be established under the Emergency Price Control Act of 1942.[1] These contracts also provided that the producers' profits gained under the contracts were to be subject to renegotiation under the Renegotiation Act.

MPR 28 fixed an individual and different price for alcohol produced by each plant of each alcohol producer. Amendment 3 and Amendment 10 to MPR 28 are the only provisions of MPR 28 pertinent here.

Amendment 3 to MPR 28 placed grain alcohol (theretofore under a fixed price ceiling), under a ceiling of cost plus a downward sliding scale of profit. Amendment 3 provided that each grain alcohol plant—not each company, but each separate plant of each company—should have as its ceiling price an amount equal to:

(a) actual manufacturing cost, plus

(b) a profit of 4¢ on each of the first 750,000 gallons produced quarterly in the plant; 3¢ for each of the next 750,000 gallons and 2¢ (increased to 2½¢ by Amendment 4) for each gallon in excess of 1,500,000; plus

(c) *a flat allowance of 3¢ per gallon for general and administrative expenses,* regardless of the actual amount of such expenses; minus

(d) the value of certain by-products.

Amendment 10 to MPR 28 changed only sub-item (c) in the preceding paragraph, so as to provide that the allowance for general and administrative expenses should be

[1] Petitioner's allowable costs, and therefore its maximum prices for such alcohol, have not been finally determined. The Administrator made a commitment that petitioner's relief, if any, under the protest would be retroactive to the date of issuance of Amendment 10 (R. 347).

limited to *actual* expenses not in excess of 3¢ per gallon. The purpose and effect of the formula, as changed by Amendment 10, has been stated by the Price Administrator and the court below to be to control each individual producer's profits so as to assure all producers a "substantially uniform rate of return on the capital invested in their plants" (R. 572).

Petitioner produced about 100,000,000 gallons annually of alcohol subject to the MPR 28 cost-plus declining scale of profit ceiling. Four of its principal competitors, namely, Schenley, Seagrams, National Distillers and Hiram Walker, produced an aggregate of about 130,000,000 gallons annually subject to this ceiling. Petitioner's entire production came from four plants (one of which produced in excess of 75,000,000 gallons annually and another in excess of 18,000,000 gallons annually) while the production of Schenley, Seagrams, National Distillers and Hiram Walker was split among 42 plants.

If the declining sliding scale profit formula had been applied on a *company* basis rather than a *plant* basis, petitioner and its four principal competitors would have been in substantially the same position. But the declining sliding scale profit formula was worked out on a plant basis and not on a company basis. The automatic result was to place 80 per cent of petitioner's production in the lowest profit bracket of 2½¢ per gallon, while only 34 per cent of the production of petitioner's four principal competitors were in such lowest bracket. Petitioner's average profit per gallon was reduced to 2.7¢ per gallon while that of its four principal competitors was 3.3¢. This differential of 6/10 of a cent per gallon between petitioner's per unit profit and that of its principal competitors allowed the latter at least 22 per cent more profit per gallon than petitioner and discriminated against petitioner to the extent of approximately $600,000 per year.

To compensate for this admitted profit discrimination inherent in the downward sliding scale of profit formula—

worked out on a plant and not on a company basis—Amendment 3 had provided a flat 3¢ per gallon allowance for general and administrative expense, for the specific purpose of providing an opportunity for large plants to increase their profits by effecting the savings on general and administrative expense inherent in volume operations. This purpose was specifically mentioned in the "Statement of Considerations" accompanying Amendment 3 (R. 313).[2] In fact, because of petitioner's economies resulting from efficient, high volume production, petitioner's overall general and administrative expenses were substantially below 3¢ per gallon.

However, Amendment 10 to MPR 28 abolished the flat 3¢ allowance for general and administrative expense and substituted actual expense not in excess of 3¢ per gallon. This Amendment was in effect from November 11, 1944 to September 30, 1945. As a result of the Amendment petitioner admittedly suffered for the first four months of 1945 alone a reduction in profits of $551,788.12, while the Amendment had very little effect upon the profits of the 42 plants of petitioner's four principal competitors (R. 477-8; Administrator's Brief below p. 9).

Petitioner's protest, filed November 18, 1944, was denied by the Administrator on July 2, 1945. Complaint was filed in the court below on July 27, 1945. On May 31, 1947 the court below entered a judgment dismissing petitioner's complaint and on July 10, 1947 denied a petition for rehearing.

The court below admitted that the effect of Amendment 10 was to "cut the complainant's profits more heavily than it did those of its competitors" (R. 571). But the court

[2] The court recognized that prior to Amendment 10, "even though the sliding scale formula of Amendment 3 provided for a lower per gallon profit for the complainant than for its competitors, its final profits per gallon were comparable to theirs because of the savings made available to the complainant by the provision for a flat 3 cents per gallon general and administrative expense allowance." (R. 571)

found Amendment 10 to be reasonable since the Administrator sought "a pricing formula" which would "assure generally to the group of industrial alcohol producers owning their own plants a substantially uniform rate of return on the capital invested in their plants" (R. 572). The court conceded that "nonetheless" if Amendment 10 "did in fact discriminate against the complainant as owner of the largest plants in the industry by denying to it in practice a rate of return on its investment comparable to that enjoyed by the smaller producers", the regulation "might well be invalid" (R. 572). The court went on to find, however, that the record in the case made it impossible "to make such a comparison" (R. 580).

On July 10, 1947 the court below entered an order amending its opinion in several respects.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In entering a judgment dismissing the complaint.

2. In holding that the Administrator had statutory authority to control the profits, as such, of petitioner.

3. In holding that the Administrator had authority to determine each grain alcohol producer's profit solely in accordance with the single standard of achieving a substantially uniform rate of return on capital investment in each plant.

4. In holding that the Administrator had authority to establish an alcohol cost-plus pricing formula which was based solely on an attempt to achieve a uniform rate of return to the group of industrial alcohol producers owning their own plants, but which was in fact applied to the entire industry, although out of 130 plants in the industry 88 were not owned by private operators but were owned in whole or in part by the Defense Plant Corporation and leased to private operators.

5. In failing to hold that the revocation of the flat 3¢ allowance for administrative expenses made MPR 28 unreasonably discriminatory against petitioner.

6. In holding that there was substantial evidence to justify the discriminatory effect upon petitioner of the sliding scale profit formula on a plant unit basis made absolute by Amendment 10's elimination of the flat 3¢ administrative expense allowance.

7. In denying petitioner due process by holding that Amendment 10 would be unlawful only if petitioner sustained the burden of proving its rate of return on capital invested in facilities used in the production of alcohol sold to Defense Supplies Corporation was reduced substantially below such rate of return received by petitioner's competitors. This holding places an insuperable burden of proof upon petitioner and completely disregards the Administrator's admission that "There are no published data anywhere on the portion of the total net worth of each of [petitioner's principal competitors] allocated to industrial alcohol production alone" (Administrator's Brief below, p. 28).

REASONS FOR GRANTING THE WRIT.

The Emergency Court of Appeals has decided—we submit incorrectly—a question of considerable and continuing importance concerning the intent of Congress in establishing its program for the control of wartime prices and profits.

This case does not involve the usual run-of-mill price regulation. Here the product involved, grain alcohol, was being sold only to the United States, through the Defense Supplies Corporation. The contracts with Defense Supplies Corporation provided for the fixing of a sale price to the United States by the Price Administrator acting under the Emergency Price Control Act. The contracts also provided that the seller's profits would be subject to excess

profit recapture under the Renegotiation Act. Petitioner's profits under these contracts will be subject to renegotiation.

There is no dispute that the Administrator's action in this case was intended—in advance of any renegotiation—to reduce the price to be paid to petitioner without material effect on the price to be paid to others, and thus to reduce petitioner's alcohol profits by some 45 per cent, leaving the profits of its principal competitors virtually untouched. The Administrator admitted that, "at the time Amendment 10 was issued it could reasonably have been expected that Complainant would bear approximately 80 per cent of the total reduction in profits effected by Amendment 10." (Administrator's Brief below, p. 9).

The crux of the opinion below is that it was proper for the Administrator so to control petitioner's profits as long as he guaranteed a substantially uniform rate of return to petitioner and its competitors on capital invested.

This principle violates the congressional plan for control of wartime profits. It was never intended by Congress that the wartime profits of individual companies should be so regulated under the Price Control Act, or by the Price Administrator. The manner in which wartime profits of individual companies were to be regulated were set forth in the Renegotiation Act, and the power to regulate such profits was vested *not* in the Price Administrator but in specially trained boards to be set up for this specific purpose. Moreover, the Renegotiation Act expressly provided that the profits of an individual company were *not* to be measured by invested capital alone, but were to be judged by seven separate standards of which invested capital is only one.

A decent respect for the program of war profit control established by Congress makes it fitting and proper that certiorari be granted herein and that the judgment below be reversed.

1. *Amendment 10 constituted unlawful profit control without reasonable basis.*—The court below stated in its

opinion that the "Administrator does not deny that the average profit per gallon of grain ethyl alcohol received by the complainant after the effective date of Amendment 10 was less than the average profit per gallon received by each of the (petitioner's) four principal competitors nor does he deny that the amendment cut the complainant's profits more heavily than it did those of its competitors" (R. 571). The court justified this discrimination, however, on the grounds that it was "reasonable" for the Administrator to so act if the pricing formula "would assure generally to the group of industrial alcohol producers owning their own plants a substantially uniform rate of return on the capital invested in their plants"[3] (R. 572).

Profit control intended to achieve a uniform "rate of return on * * * capital investment" finds no support in the Price Control Act, and negatives the elaborate program of profit control established by the Congress in the Renegotiation Act.

Congress never intended to grant to the Administrator the power to control wartime profits of individual concerns,[4] especially on their sales to the Government. In holding that the Administrator could properly fix profits as such the court below usurped the function of the Congress by reading into the Price Control Act a provision which Congress refused to enact into that statute.

During the 1944 hearings on the extension of the Price Control Act, an attempt was made to amend the Act by specifically prohibiting the Administrator from fixing profits. The Conference Committee rejected the amendment on the grounds that it might create the impression that the right

[3] It is significant that this plant investment theory, not shown in any Statement of Considerations, was advanced by the Administrator for the first time in disposing of the protest herein.

[4] Except where applications for price increases were made to the Administrator, he could not take cognizance of individual company profits. (Testimony of Chester Bowles, Administrator. 1944 Hearings before House Committee on Banking and Currency, page 1971.)

to control profits as such had existed theretofore. The Committee Report states—[5]

> "* * * the Price Administrator does not have the authority to fix profits, as such, under any circumstances."

Even prior to that time, the then Associate General Counsel of OPA had testified before the Congress:[6]

> "[OPA] has been granted no authority by Congress to control the profits of individual concerns. It has not been directed by the President to do so. It has never sought to do so. In the very nature of the case, it would not be able to do so."

The reasons why Congress refused to allow the Price Administrator to control the wartime profits of individual companies can best be demonstrated by comparing what the Price Administrator tried to do in this case—to establish a price formula designed to achieve, before the event, a uniform rate of return on investment throughout an industry—with the completely different standards established by the Renegotiation Act,

First, the Renegotiation Act is based on the theory that the reasonableness of an individual company's profits cannot be determined before the profits are realized but after they are realized.

Second, Congress has said that this determination shall be made only after an extensive study of each company's wartime performance—which the Price Administrator obviously could not make before the event and would not have been qualified to make in any event.

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[5] House Conference Report No. 1698, p. 16 re: S. 1764, 78th Cong. 2d Sess.

[6] Testimony of Henry M. Hart, Jr., Esq. before House Committee to Investigate Executive Agencies (1942 Hearings), pp. 1199-2000.

Third, the "amount and source of public and private capital employed and net worth" (Appendix B, p. 19) is only one of the many legislative standards to be employed in determining excessive profits. Other factors to be considered, the Act states, are the efficiency of the contractor, its contribution to the war effort, character of its business, including complexity of manufacturing technique, et cetera. When the Price Administrator issued Amendment 10—before any alcohol was produced under that Amendment—he could not possibly have considered these factors.

The reasons why a uniform rate of profit on invested capital cannot be the sole standard for determining excessive profits is clear from the testimony of Colonel Maurice Hirsch, Chairman, War Contracts Price Adjustment Board, before the Ways and Means Committee of the House, in 1945. (Hearings 79th Cong., 2d Sess. on H. R. 2628 pp. 94-95):

> "In reaching our conclusions we do not tie ourselves to a percentage of net worth. The influence of other factors is too varying and too great to allow net worth to be controlling.
>
> * * *
>
> "It should be noted that some outstanding wartime operations are based much more largely upon know-how and personal effort than upon capital investment. In some such cases, a profit representing a very high percentage on net worth might be totally inadequate compensation for the job done.
> "*Obviously, we cannot use net worth as the sole factor.*" (A fuller recital of Colonel Hirsch's testimony is appended hereto in Appendix C; *infra* p. 20).

Fourth, the Renegotiation Act affords aggrieved persons a review *de novo* before the Tax Court, a tribunal especially versed in excess profits determination. This review is far broader than the limited review of pricing regulations permitted to the Emergency Court of Appeals.

It is clear, therefore, that Amendment 10 not only constituted an unlawful exercise of the Price Administrator's

powers, but an attempt to frustrate the congressional plan for profit control by applying principles wholly rejected under the Renegotiation Act.[7]

The effect of the Price Administrator's attempt at individual profit control is to limit petitioner, before the event, to a profit based solely on its invested capital, and to deprive it of any possible higher profit, even if the appropriate governmental agencies, acting under the Renegotiation Act *after the event,* would have considered a higher profit than that allowed under Amendment 10 justified in the light of all the historical facts and circumstances. It also deprives petitioner of a *de novo* review of its allowable profits in the Tax Court.

2. *The adoption of the plant investment theory was unreasonable, on four separate grounds.*

First: Even if the Administrator had authority to fix the profits of individual companies, it was unreasonable for him to measure individual profits solely by invested capital. As a sole standard, invested capital is not only a bad choice on grounds of common sense and ordinary business experience. It is also a choice which was specifically rejected by the Congress before it was approved by the Administrator.

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[7] The inequity of justifying Amendment 10 on the "plant investment" theory is also demonstrable on other grounds. The "plant investment" theory has its basis in the public utility field. That Congress never intended to grant the Administrator powers of price fixing comparable to those governmental agencies charged with determining rates of profits for public utilities is, of course, clear. A memorandum submitted to the Congress by Messrs. Leon Henderson and David Ginsburg during hearings on the Act stated:

> "The principal issues involved in public utility rate proceedings are traditionally subjects for judicial determination, revolving about the common law right of the public to receive the services of the utility at a just and reasonable charge and the constitutional right of the utility to earn a fair return on the fair value of its property. The same questions are not involved in the price control bill." (Page 332, Hearings before House Committee on Banking and Currency 77th Cong., 1st Sess. on H. R. 5479 (superseded by H. R. 5990)).

Amendment 10 was adopted on November 11, 1944. The seven standards of the Renegotiation Act became law on February 25, 1944. It was plainly unreasonable for the Administrator to overrule or ignore the judgment of Congress on this critical question.

Second: This Court has held that a fair rate on a capital investment for one utility "may be inadequate for another, depending upon circumstances, locality and risk." *United Rys. and Electric Co. of Baltimore* vs. *West,* 280 U. S. 234, 249, 50 S. Ct. 123. To classify grain alcohol producers according to their respective capital investments and to fix a profit pattern for them on that basis violates the very principles of public utility regulation which the Administrator attempted to invoke in this case. In the alcohol industry some of the factors that normally establish the profit pattern are: size of plant, *prudent* investment, geographical location, proximity to rail and water transportation and to sources of labor and material supply, and above all, efficiency of management. Yet the prudence of each company's investment was apparently of no interest to the Price Administrator.

Third: The court below found it "reasonable for the Administrator" to promulgate Amendment 10 "by the use of a pricing formula which would assure generally to the group of industrial alcohol producers owning their own plants a substantially uniform rate of return on the capital invested in their plants." Amendment 10, however, applied not only to producers owning their own plants, but to the entire industry. As a factual matter, this finding disregards the fact that out of 130 plants in the industry 88 were owned in whole or in part by the Defense Plant Corporation[8] and leased to private operators. The govern-

[8] The extent of such government owned facilities existing in the alcohol industry, is shown in the report (of which the court below took judicial notice) of the Secretary of Agriculture in response to Senate Resolution 176, 79th Congress, Second Session, Document No. 167.

ment-owned capital facilities of the 88 plants obviously had a zero book value so far as the private operator was concerned. Under the cost-plus sliding scale formula rentals paid to the government were allowed as an item of costs and a producer with a zero capital investment of his own received exactly the same rate of profit per gallon as the producer who owned all of his facilities. In the face of the fact that out of 130 plants in the industry 88 were owned in whole or in part by the government, the profits allowed to such plants under Amendment 10 could not possibly have had any uniform relation to capital investment.

Fourth: The classification of grain alcohol producers according to plant volume and the fixing of a diminishing profit scale are without historical basis in this or any other industry and constitute discriminatory classification without reasonable basis. It violates the basic principle of mass production, upon which American prosperity and the American war potential rests that the larger plant has greater operating economies and can thus achieve a larger rate of return on its investment than can the small plant.

Any pricing formula created by the Administrator must be reasonably related to the pattern of the field administered.[9]

3. *The discrimination in this case is clear.*—We submit that the record in this case required the court below to invalidate Amendment 10 because of unlawful discrimination.

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[9] The authorities are clear that price fixing must have its roots in the field being administered. In the case of *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453, the legislature fixed minimum prices for milk sold by large well-advertised producers at 1¢ a quart above that allowed other producers on the ground that the products sold by the former historically commanded a higher price. This Court held that such action when founded on industry experience was lawful. In a companion case, however, (*Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266, 56 S. Ct. 457) this Court rejected the same formula when a newcomer in the milk business was subjected to the higher minimum, on the ground that the differential was discriminatory when so applied.

Under Amendment 10 Publicker's production was allowed an average profit per gallon of 2.7¢ as contrasted with an average profit of 3.3¢ per gallon for the production of the "Big Four". The following tabulation[10] shows the average profit per gallon of each of the members of the "Big Four" and Publicker under Amendment 10.

Company	No. of Plants	Average Profit per gallon
Schenley	12	3.5¢
Seagram	14	3.3¢
National	13	3.3¢
H. Walker	3	3.1¢
Total	42	3.3¢
Publicker (Petitioner)	4	2.7¢

Under the Price Control Act it "is essential to fair treatment that all persons who are similarly situated be dealt with upon an equal basis; that no greater burdens be laid upon one than are laid upon others in the same calling". (*Hawaii Brewing Corporation* v. *Bowles*, 148 F. 2d 846, 850).

We submit that the discriminatory effect of Amendment 10 is clear.

4. *The burden of proof placed on petitioner by the court below is impossible to sustain.*—The court below admitted (R. 573) that Amendment 10 might well be invalid if a "comparison between the rate of return received by the complainant upon its capital investment and that received by its competitors would lend support to the claim of discrimination" if it were to appear that following Amendment 10 the complainant's rate was reduced substantially below that of its competitors." However, the court below also found (R. 574), that, to be probative, evidence on rate

[10] This tabulation in part appearing in the Complaint at Page 11 (R. 540), has been substantiated by material incorporated in the record by the Administrator. (R. 467).

of return upon capital investment must be confined to evidence of rate of return on capital invested exclusively in facilities used for the manufacture of grain alcohol—excluding facilities used for the production of numerous other products.

Most of the profits of petitioner and of its four principal large scale competitors were derived from sale of products other than industrial alcohol sold to the government. There is, as the court below stated, nothing in the record showing what amount of the capital investment of the "Big Four" was devoted to the manufacture of grain industrial alcohol. Nor could the record possibly reveal such evidence. For as the Administrator admitted in his brief in the court below, "There are no published data anywhere on the portion of the total net worth of each of the Big Four allocated to industrial alcohol production alone." (Petitioner's Brief below, p. 28).

The court below has therefore imposed on petitioner a burden of proof even more insuperable than the burden referred to by Mr. Justice Roberts in his dissent in *Yakus* v. *United States*, 321 U. S. 414, 452-458; 64 S. Ct. 660, 681-683 (1944).

To uphold the decision of the court below on the Administrator's theory is, in effect, to deny petitioner a tribunal in which to plead his cause, and is violative of those guarantees of due process which afford aggrieved persons an opportunity to plead their cause before a proper forum.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 1947.

APPENDIX "A"

Statutory Provisions Involved—Emergency Price Control Act of 1942, as amended. 50 App. U. S. C. 901; 56 Stat. 23.

Sec. 901 "(a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; * * *".

Sec. 902 "(a) Whenever in the judgment of the Price Administrator (provided for in section 201) [section 921 of this Appendix] the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act [sections 901-946 of this Appendix], he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act [sections 901-946 of this Appendix]. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * * *provided,* That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order and shall give consideration to their recommendations."

* * *

"(h) The powers granted in this section shall not be used or made to operate to compel changes in the business

practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act [sections 901-946 of this Appendix]."

Sec. 924 "(a) Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint.

"(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious."

APPENDIX "B"

Statutory Provisions Involved—Renegotiation Act, as amended. 50 App. U. S. C. 1191; 58 Stat. 78.

Sec. 1191 "(4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

(iii) amount and source of public and private capital employed and net worth;

(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;

(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

APPENDIX "C"

Portion of Testimony of Colonel Maurice Hirsch, Chairman, War Contracts Price Adjustment Board, in House Ways and Means Committee Hearings pp. 94-95 on H.R. 2628, a bill to extend the Renegotiation Act, 79th Cong., 1st Sess.

"In most instances contractors who have made investments in facilities for war production have been given protection under certificates of necessity which Congress provided for. Many of them recoup out of wartime operations every dollar of their investment through reductions in taxes and in renegotiation refunds, and this is so irrespective of the availability of the facilities for post-war use. That is probably desirable from the viewpoint of the general economy, but it is a fact we must take into consideration in renegotiation. It is definitely an element in the risk factor.

"In reaching our conclusions we do not tie ourselves to a percentage of net worth. The influence of other factors is too varying and too great to allow net worth to be controlling.

"Of course, the investment utilized for war is an important factor. In evaluating it, we try to allocate to renegotiable production that part of the contractor's net worth which is used for that production. We should not consider that part of his net worth which has nothing to do with war production. It should be noted that some outstanding wartime operations are based much more largely upon know-how and personal effort than upon capital investment. In some such cases, a profit representing a very high percentage on net worth might be totally inadequate compensation for the job done.

"Obviously, we cannot use net worth as the sole factor. We must in each instance weigh all of the pertinent factors which you specified in the Renegotiation Act. You, however provided that the War Contracts Price Adjustment Board might designate additional factors if it deemed their consideration advisable in order to reach satisfactory conclusions in renegotiations. Up to the present time the Board has not found a single factor which it feels should be added to those which were suggested by this committee to be incorpo-

rated into the law and which were adopted as a part of the present act.

"You have not give us exact formulas. We have, however, had many formulas suggested to us. We have examined, I should say, at least 250 of them. There was not one that did not do injustice in many instances either to the contractors or to the Government. We have not been able to find a formula which would apply adequately and justly across the board even to any segment of the renegotiation operation.

"Let me give you the simplest kind of case to illustrate the variables we encounter. Let us assume contractor A has had many years of experience in producing a particular type of product. His plant is not modern, and he knows its deficiencies. He cannot expand it because of physical or other limitations. The Government needs certain items which he can produce, but in greater quantity than possible with his plant capacity. So the Government builds a plant for contractor B. Contractor A freely gives the Government his engineering experience, his patents, his production know-how. A actually aids in creating a competitor who, in a streamlined plant, may even put A out of business when the war is over. Let us assume that it costs A $900 to produce the item, and that B is producing it for $750. Yet A may be operating his antiquated plant more efficiently than B is operating his streamlined plant. Which one should have more dollars of profit per unit of production? It is our job, based upon all the information available to us to determine in each case the bounds of proper compensation for what the contractor did—to evaluate his contribution to the war within the limits and in the light of the factors you have defined in the statute.

"*Mr. Reed.* Do you have any standard principles to act on besides statutory principles?

"*Colonel Hirsch.* Only amplifications of the statutory principles.

"In applying those principles we must, of course, study the nature of the operations of the particular contractor whose situation is under review. We study the history of his industry, the risks normally inherent in it, the capital requirements and customary return.

"We have found instances where it requires a dollar of investment extremely well utilized to turn out 80 cents in sales in a year.

"We have found, on the other hand, a number of cases where $1 of investment will turn out more than $400 in sales in the course of the year. You cannot apply the same kind of percentage to those cases, and we do not attempt to do so. Our objective is to apply the factors set out in the statute and in that application to evaluate what the contractor has done, both absolutely and comparatively."

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CITATIONS

Statute:	
Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 901 *et seq.*):	
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Regulations:	
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758700—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 250

PUBLICKER INDUSTRIES, INC., PETITIONER

v.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 569–575, 580) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on May 31, 1947 (R. 576). By order of the court dated June 6, 1947, Earl W. Clark, Director of the Division of Liquidation, Department of Commerce, was substituted as respondent for Philip B. Fleming, Temporary Controls Administrator, who had suc-

ceeded to the powers and duties of the Price Administrator (R. 577). On July 10, 1947, the court entered an order amending its opinion and denying the petitioner's motion for reversal of judgment or for rehearing (R. 580). The petition for a writ of certiorari was filed on August 8, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether Maximum Price Regulation No. 28, under which the prices of industrial alcohols sold to the United States were determined by adding to each plant's actual unit costs fixed margins in accordance with a sliding scale, varying with volume, was invalid as to the petitioner.

STATUTE AND REGULATION INVOLVED

The statutory provisions involved are contained in Sections 1 and 2 of the Emergency Price Control Act of 1942, as amended (Appendix A., *infra*, pp. 10–11). The pertinent provisions of Maximum Price Regulation No. 28, as amended (9 F. R. 13209), are set forth in Appendix B., *infra*, pp. 12–13.

STATEMENT

Ethyl alcohol was first brought under price control by Price Schedule No. 28 (issued Sep-

tember 15, 1941, 6 F. R. 4761), which fixed specific dollar-and-cents prices for all sellers. On February 17, 1942, this regulation was re-issued by the Price Administrator under the authority of the Emergency Price Control Act of 1942, as amended, with the title Revised Price Schedule No. 28 (7 F. R. 1257). By Amendment 2 to Revised Price Schedule No. 28 (issued September 17, 1942, 7 F. R. 7401), distilleries which had been converted from the production of alcoholic beverages to the production of industrial alcohol for war purposes and were selling ethyl alcohol to the United States Government were given the option of making such sales at the fixed dollar-and-cents prices, or at prices determined by a cost-plus formula. Revised Price Schedule No. 28 was subsequently superseded by Maximum Price Regulation No. 28 (issued February 22, 1943 (8 F. R. 2339)), which thereafter governed prices of all sales of ethyl alcohol, excluding ethyl alcohol produced on the West Coast. By Amendment 3 to Maximum Price Reguation No. 28 (issued June 28, 1943, 8 F. R. 9016), the cost-plus formula was made available to all producers of ethyl alcohol from grain, including producers like the petitioner, whose regular business was the production of ethyl alcohol.

For each plant the formula provided for a price, to be determined quarterly, equal to the sum of the following: (1) certain specified costs; (2) a fixed allowance of 3¢ per gallon to cover

general and administrative expenses; and (3) a profit allowance of 4¢ per gallon for the first 750,000 gallons, 3¢ per gallon for the next 750,000 gallons and 2¢ per gallon (increased to 2½¢ by Amendment 4) for production in excess of 1,500,000 gallons.[1] Amendment 10 to Maximum Price Regulation No. 28 (issued November 6, 1944, 9 F. R. 13209), changed the 3¢ per gallon fixed allowance for general and administrative expenses to an allowance measured by actual general and administrative expenses in no event to exceed 3¢ per gallon.[2]

The petitioner filed a protest (R. 1–13) against Amendement 10, which was duly considered on all the evidence adduced and, after oral argument before a Board of Review and the receipt of their report, was denied by the Price Administrator on July 2, 1945 (R. 338–369). Thereafter, the petitioner filed a complaint in the United States Emergency Court of Appeals (R. 531–549). The proceeding was subsequently remanded to the Price Administrator for the receipt of additional evidence (R. 374). The protest was denied on reconsideration by the Price Administrator on July 22, 1946 (R. 513–528), and this denial was sus-

[1] The formula also provided for the deduction from production costs of the value of certain by-products.

[2] The statutory statements of considerations accompanying Amendments 3 and 10, which detail the economic and other justifications for such amendments, are set forth in the Record, at pp. 310–315 and 329, respectively.

tained by the court below (R. 513–515, 516–528, 569–575).

ARGUMENT

The petitioner is the firm most seriously affected by the administrative action complained of (Pet. 5–6), and the gravamen of its petition is not that its profits under the regulation were inadequate by any absolute yardstick or even by any relative yardstick, such as its own pre-war experience or its competitors' current experience, but (1) that its sales to the government were less profitable under the regulation as amended by Amendment 10 than they had been under the regulation as amended by Amendment 3, and (2) that the change effected by Amendment 10 bore more heavily upon it than upon other producers. The petition thus presents neither a substantial constitutional question nor a significant question of administrative law requiring this Court to take jurisdiction, and, for that reason alone, it should be denied.

Moreover, the decision of the United States Emergency Court of Appeals was eminently correct. The petition stresses at great length the impropriety of the view of the court below as to the Price Administrator's statutory authority to regulate profits. It apparently urges as error that the court below construed the statute as authorizing control of profits of alcohol producers merely for the purpose of restricting their net

profits to a pre-conceived figure. But the court did not hold "that the Administrator had statutory authority to control the profits, as such, of petitioner," and thus in this respect the petition is grounded upon a fundamental misconstruction of the opinion below (Pet. 7). The court simply declared that "any cost-plus pricing technique necessarily involves the fixing of profits as an element" (R. 575). The petitioner does not complain of the adoption by the Administrator of a cost-plus pricing technique, since risk of any loss on petitioner's sales was thereby eliminated. Nor did the court below hold that the Administrator was in fact determining "each grain alcohol producer's profit," or that the regulation was based "solely on an attempt to achieve a uniform rate of return to the group of industrial alcohol producers owning their own plants" (Pet. 7). There is nothing in either the court's opinion or the record to support the petitioner's conclusion that the Administrator established any predetermined (albeit unspecified) rate of return on investment for all producers; except to the extent that profits are *ipso facto* limited by price control, petitioner's profits were limited only by the capacity of its plants and its own efficiency.

The court below analyzed the two administrative actions which the petitioner has held out in contradistinction to each other, Amendments 3 and 10 to Maximum Price Regulation No. 28. It

found, in effect, that the Administrator had first adopted as a major purpose the encouragement of increased production and had, consequently, utilized a formula which provided prices *higher* than those he would otherwise have established under the normal statutory standards of general fairness and equity. However, when the industry "had achieved almost peak production" (R. 572), the special incentive[3] was eliminated to accomplish other purposes of the Act, "* * * to prevent abnormal increases in prices, to eliminate and prevent profiteering, and to assure that defense appropriations were not dissipated by excessive prices." Section 1 (a) of the Act, cited by the court below (R. 572).

The petitioner was the chief loser by the elimination of the special incentive in the form of the flat 3¢ per gallon allowance for administrative expense because it had been the chief beneficiary of its adoption. The court below, in reviewing the continuing validity of the regulation as amended by Amendment 10, as against peti-

[3] The fixed allowance of 3¢ per gallon for general and administrative expenses was intended to stimulate maximum output, particularly of high volume producers, since expenses would decrease as volume increased; and the producer's profit would be swelled by the difference between the 3¢ per gallon administrative expense allowance and actual administrative expense incurred. Statement of considerations involved in the issuance of Amendment 3 to MPR 28 (R. 310–315).

tioner's complaint that it was unlawfully discriminatory, applied return on investment as a test and found no unlawful discrimination (R. 572–575).[4] While the petitioner quarrels with the the application of return on investment as a test, it suggests no alternative test, arguing, in effect, that the regulation *a priori* is invalid because it results in different average unit margins of profit. But clearly the petitioner has not sustained its burden of proving the Administrator's method of classification to be arbitrary or unreasonable.[5]

CONCLUSION

The decision below is correct, and there is no warrant for review of the questions presented by

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[4] As the petitioner points out (Pet. 7, 14–15), the pricing formula was uniformly applied whether or not the producer's plant was wholly or partly owned by the Government. The petitioner does not complain of discrimination on this score, having been the beneficiary of the largest government investment, dollarwise, in alcohol plants. The extent of government investment in alcohol plants is summarized in a report to the Senate by the Secretary of Agriculture, Senate Document No. 167, 79th Cong., 2d sess.

[5] The petitioner does argue that the burden of proof placed upon it is "insuperable" (Pet. 8). The implication of the petitioner's argument appears to be that a regulation must be held invalid whenever a party attacking it finds proof of its invalidity to be beyond his power. However, in support of its argument, the petitioner points out only that the court below found the record inadequate to support the conclusions urged upon it by the petitioner and that the available published data was insufficient for the same purpose (Pet. 17).

the petition. The petition should therefore be denied.

Respectfully submitted.

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AUGUST 1947.

APPENDIX A

Pertinent Statutory Provisions

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED, 56 STAT. 23, 58 STAT. 632

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; * * *

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, * * *; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section

201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *

APPENDIX B

Pertinent Regulatory Provisions

MPR 28—ETHYL ALCOHOL (EXCLUDING WEST COAST ETHYL ALCOHOL)

(As Amended by Amendment 10)

§ 1412.263 (h) *Sales of certain ethyl alcohol to the Defense Supplies Corporation.* (1) The maximum price for the sale by any plant to the Defense Supplies Corporation of ethyl alcohol of 190 proof distilled from grain shall be the maximum price set forth in paragraphs (a) to (d) of this section, or a maximum price computed pursuant to the formula below. * * *

Maximum price per gallon of 190 proof ethyl alcohol f. o. b. works shall be the sum of the following cost items per gallon, less the recovered value of dried feed, fusel oil and the like, plus a margin for profit computed pursuant to subparagraph (2):

(i) Direct materials.

(ii) Direct labor.

(iii) Miscellaneous direct production charges.

(iv) Indirect production expenses.

(v) Miscellaneous direct expenses.

(vi) General and administrative expense, not in excess of $.03 per gallon.*

* * * * *

(2) The per gallon margin of profit shall be allowed on the alcohol produced in each plant as follows: For each gallon produced and sold to the Defense Supplies Corporation during a calendar quarterly period, up to and including 750,000 gallons, 4 cents per gallon; for each gallon produced and sold during a calendar quarterly period over 750,000 gallons and up to and including 1,500,000 gallons, 3 cents per gallon; and for each gallon produced and sold during a calendar quarterly period over 1,500,000 gallons, 2½ cents per gallon.

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* Between July 1, 1943, the effective date of Amendment 3, and November 11, 1944, the effective date of Amendment 10, this provision read as follows:

"(vi) An allowance of $.03 per gallon for selling and general and administrative expenses."

U. S. GOVERNMENT PRINTING OFFICE: 1947